between the parties, I do not consider that section 88(3) of the Act can be invoked. This is so as the preamble of the Act in part states that the Act is to "amend and consolidate the laws relating to divorce; and to provide for matters incidental thereto". Thus jurisdiction under section 88(3) of the Act can only be invoked if this custody application forms part of the ancilliary relief sought by the plaintiff in a petition for divorce between her and the defendant. As this is not so, she cannot therefore resort to section 88(3) of the Act.

As the marriage between the parties is still subsisting, the plaintiff should have made this application under section 5 of the Guardianship of Infants Act 1961 which confers guardianship of an infant to the father with the mother having care and control of such infant. Nowhere in the affidavit in support of her application has the plaintiff averred to any act done by the defendant as to warrant any fear that the care and control of her son is being threatened and neither has the affidavit shown the defendant to be an unfit father to retain custody of their son. The affidavit however does make reference to matrimonial differences between the parties and to acts of assault inflicted on the plaintiff by the defendant's father. It was because of these differences that the defendant agreed to allow the plaintiff to take their son away to her parents' home in December, 1983 and since that date, the affidavit has not disclosed any fact which points to the defendant being a person unfit to retain custody of his son. On the contrary, the plaintiff admits that the defendant visits the child from time to time but has not stated whether such visits have any adverse effect on the child or that the defendant had threatened to take the child away from the plaintiff's care and control. To that extent, I consider that the defendant's behaviour has in no way given me the impression that he has abandoned custody of his son altogether.

The plaintiff's prayer for maintenance for her son is made under section 93(1) of the Act; and for the same reason that there is no pending action for divorce between the parties, the plaintiff cannot resort to this section. She should have made the application under section 3 of the Married Women and Children (Maintenance) Act 1950, in which case, she must show that the defendant had neglected or refused to maintain his son but there is nothing in her affidavit to show this. Thus, both on procedure and on the merits, I had dismissed this Originating Summons but made no order as to costs. Needless to say should circumstances between the parties change, in the future the plaintiff is at liberty to proceed with the prayers which she sought in this Originating Summons.

Application dismissed.

Solicitors: *Ng Ek Teong & Partners; Syarikat Davidason.*

ABDUL MALIK BIN ABDUL MAJID v. ASNAH BTE. HAMID & ANOR. DAGANG BIN BACHIK v. ABDUL MALIK BIN ABDUL MAJID

[O.C.J. (Shankar J.) April 19, 1985]

[Malacca – Civil Suits No 86 of 1981 and 121 of 1982]

Contract – Contract relating to land – Specific performance – Purchase of undivided share in land subject to letters of administration – Whether purchasers are co-purchasers in a joint venture or mere agent and principal – Distribution of estate under Muslim Law – Private caveat – Assignment of rights – Forfeiture of deposit – Specific performance – Lien – Allegation of fraud – Duty of administrators to obtain best possible price – Damages for breach of contract – Failure of consideration and duty to refund – Parties bound by their pleadings – Onus of proof upon those alleging fraud – Duty of counsel as officer of the court.

Legal Profession – Solicitors – Duty of – Solicitor's duty to explain nature of documents to clients – Solicitor's conflict of interest – Solicitor's duty to inform party to seek independent legal advice – Failure of solicitor to provide party with copy of document executed – Illiteracy of party.

In this case the court had to consider the effect of an agreement executed by the beneficiaries of the estate of the deceased with the two plaintiffs in these two joint actions. The court had also to consider whether the relationship between the said two plaintiffs was that of a principal and agent or whether they were co-purchasers in a joint venture.

Held: (1) no binding contract was ever made between the parties and it is not for the court to make one for the plaintiff;

(2) the evidence shows both parties were under a misapprehension as to what precisely they were selling and at what price;

(3) the terms of the contract were clearly too uncertain to be enforced;

(4) the caveat lodged by the 1st plaintiff must be removed as the third co-owner of the land in question had no dealings whatsoever with the plaintiff and there was no reason why the third co-owner should ever have been encumbered with the caveat;

(5) as there was no binding contract, the claim for damages must also fail;

(6) as the moneys, totalling $11,000/–, had been given for a consideration that had failed, the moneys must be refunded;

(7) the claim that the assignment by the second plaintiff to the first plaintiff was unconscionable and should be set aside had not been proved and must also fail.

Cases referred to:

(1) *Buttle* v. *Saunders* [1950] 2 All E.R. 193.
(2) *Davy* v. *Garrett* (1877) 7 Ch.D. 473, 489.
(3) *Associated Leisure Ltd.* v. *Associated Newspapers Ltd.* [1970] 2 Q.B. 450, 456.

HIGH COURT.

Humfrey Ball for the plaintiff.
Thara Singh for the defendants.

Cur. Adv. Vult.

Shankar J.: These two actions are both related to a piece of land known as Holding No. 393 in the Mukim of Bertam, Malacca.

The first action is a claim for specific performance of alleged contracts of land which are said to have been made by the Defendants therein. The Plaintiff in this first action is hereafter referred to as Malik and the Defendants as Asnah and Esah respectively. The second suit concerns a claim by Dagang bin Bachik (hereafter referred to as Dagang) against Malik for a declaration that they are both jointly entitled to all the profits from any resale of the said land after the purchase thereof from Asnah and Esah have been completed and for damages against Malik for attempting to deprive Dagang of his just profits and for consequential relief.

Although the court was only concerned with the trial of the first action when the hearing commenced, both Counsel agreed shortly thereafter, that the two actions should be heard together and a single judgment given.

To put matters in perspective, I think it will be useful initially to set out the facts which are common ground.

This land is said to have been originally registered in the names of three persons Hamid bin Mahmud, Ahmad bin Mahmud and Husin bin Mahmud. All of them are deceased. On May 23, 1951 Mohamed bin Mahmud was registered on the title to the said land as administrator of the estate of Husin bin Mahmud to a 1/3 share of the said land.

Asnah's father is Hamid bin Mahmud. Esah's father is Ahmad bin Mahmud.

On March 22, 1980 Asnah and Esah gave a written option to Dagang and one Yusoff bin Mohd. Zin for $40,000. The option was to continue in force until the sale and transfer of the title was completed. The option was supported with a consideration of $1.

On April 24, 1980 Asnah entered into a written agreement with Malik and Dagang for the sale of her share of the said land which share was to be evidenced by a Fatwa to be obtained from the Majlis. She received an advance of $3,000/–. The balance of the actual price of $40,000/– was to be paid on completion of the transfer.

On April 28, 1980 Malik and Dagang entered into another written agreement, this time with Esah acting for herself and on behalf of her six other brothers and sisters, for the sale of their shares under Islamic Law of the said land, for which Esah received an advance of $7,000 to be forfeited if it was subsequently discovered that the land had already been sold.

On June 9, 1980 Malik and Dagang entered into yet another written agreement with Asnah, to prolong her agreement dated April 24, 1980, for which she received an additional $1,000/–.

Malik says, and it is not disputed, that he helped to procure the registration of Asnah and Esah as owners of the said land. But it should be noted that Asnah was registered as owner of a 1/3 share of the said land on September 13, 1980. Esah was likewise registered on September 23, 1980.

Malik's claim is that he alone was beneficially entitled to enforce the contract against Asnah and Esah and that Dagang's role in the matter was only as his agent. Malik says that whilst Dagang may have had hopes of a prospective commission once the sale was completed there was no legal obligation on Malik's part to pay Dagang anything. In Malik's own words:–

"No commission was discussed between me and Dagang. There was no discussion at all about how Dagang was to be rewarded for his efforts. He should get his commission from the sellers. It was up to me to give him something. If I did not want to give him anything, that was also up to me. I thought he had no independent rights in the matter."

But Dagang's evidence is that he considered himself at all material times a co-purchaser of

the land and that consequently he was involved in a joint venture with Malik with a view to profit to which both of them were entitled.

This difference in opinion is the root cause of the dispute between them both.

Dagang's subsequent acts towards procuring a resale of the said land resulted in a letter dated September 2, 1980 emanating from M/s Ee Yew Lin & Sons, a firm of solicitors in Malacca who stated in the letter that their client was prepared to purchase the said land for $147,050 (referred to hereafter as the resale letter).

This letter was handed by Dagang to Malik. What happened after that is clouded by controversy.

Malik says that he took exception to Dagang's acts in attempting to dispose off the said land and that the result of the exchanges between them was a written agreement on September 20, 1980 whereby Dagang irrevocably assigned all his rights to the said land to Malik for a consideration of $4,750.

Dagang on the other hand contended that what was discussed between him and Malik was the division of the profits which it was now evident was going to be available, that he was led to believe that the document which he signed in favour of Malik was to constitute written evidence that he was indebted to Malik in the sum of $4,750 which had been lent to him earlier, and that this money was to be set off against his share of the profits on a resale.

On September 11, 1980 Malik caused a letter to be given to Dagang setting out the details of the loan and Dagang says he signed this.

On September 17, 1980 Malik's solicitor Mr. D.A. Devadason threatened legal action in a letter to Dagang sent by ordinary post. In it he protests, on behalf of Malik, that Dagang had been unilaterally endeavouring to sell the said land even though it was the subject of an agreement of sale between the beneficiaries of the land and Malik for $40,000 in consideration for which En. Abd. Malik had advanced $11,000 to the said beneficiaries and a further sum of $4,750 to Dagang.

It would appear from the said letter that copies thereof purport to have been extended to M/s Ee Yew Lin & Sons, Malik, Esah and Asnah.

On September 23, 1980 Esah was registered as owner of 1/3 share in the said land.

On October 8, 1980 Mr. D.A. Devadason on behalf of Malik applied for and entered a private caveat. In it he stated that "the grounds of my client's claim to the land are that pursuant to the agreements dated April 24 and 28, 1980 ... all the land ... had been sold to Abd. Malik bin Abd. Majid for a price of $43,000 of which $11,000 had been paid to Esah ... and Asnah ... administratrices of the estate of Mohamed bin Mahmud and Amid bin Mahmud deceased and a further sum of $4,750 to one of the option holders Dagang." Copies of the purchase agreement and the assignment were lodged with the caveat. The discrepancy in the sale price previously $40,000 and now $43,000 was not explained.

Thereafter nothing appears to have transpired until July 3, 1981 when Dagang sent a letter by AR registered post to Asnah referring to the option and stating that the effect of it was an agreement to purchase Asnah's 1/3 share for $40,000 and that because of alleged complaints from Asnah about the delay in completion, she should take notice that if Malik and he did not pay her the balance of $36,000 in 2 weeks she was to forfeit the sum of $4,000 and feel free to sell the land to any other purchaser. A copy of this letter was extended to Malik.

The same day Dagang sent a letter by AR registered post to Esah. In this he stated that the $7,000 paid was a 10% deposit for Esah's 1/3 share and that if the balance of $63,000 was not paid within 2 weeks she was to consider herself entitled to forfeit the deposit paid and sell to any other purchaser of her choice. A copy of this letter was also extended to Malik.

On behalf of Malik, Mr. Devadason responded by a letter dated July 7, 1981 wherein he stated that Dagang had no business to write the letters in question because he had already assigned all his rights on September 20, 1980 to Malik. Further, that if Dagang continued to interfere police action would be taken. Copies of this letter were extended to Esah and Asnah.

By a letter dated July 14, 1981 Dagang wrote to Asnah and Esah repeating their entitlement to receive a further $36,000 and $63,000 respectively for their ¾ shares and went on to state that Malik by himself or his lawyer had no unilateral authority to deal with the matter and that if the

total balance was not paid by July 20, 1981 they were to feel free to forfeit.

The same day Dagang wrote to Mr. Devadason and Malik denying any agreement on September 20, 1980 and inviting Malik to join him in paying up $99,000 by July 18, 1981 to complete.

Malik's response through his solicitor was to give notice of action on July 24, 1981.

His action was commenced on August 11, 1981. The writ was accompanied with a Statement of Claim giving brief particulars which were tantamount to an averment that there was an existing contract of sale, that Dagang's role had only been that of an agent, and that since valuable consideration had been given the Plaintiff was entitled to specific performance and to a lien on the said land.

On November 24, 1981 Mr. Thara Singh Sidhu filed a defence in this action for Asnah and Esah. In brief each of them alleged that they had only agreed to sell their 1/3 share for $40,000 and $70,000 respectively and that in any case Malik's action against them was premature and misconceived in that he did not have sole title to enforce any claim against them, their obligation being to Malik and Dagang jointly.

Whilst this action was pending for trial Dagang himself filed his action on July 15, 1982. Not only did he ask for a declaration that he and the Plaintiff were jointly entitled to all profits in respect of any sale of the land consequent upon the option with Asnah and Esah as and when they became enforceable, but also prayed for damages for fraudulent acts and representation of Malik in attempting to deprive Dagang of his just profits.

We must now grapple with the contested issues of fact.

The first issue is whether Dagang was a mere agent of Malik or whether he was a co-purchaser in a joint venture. Dagang's evidence is that he first came to know that the said land was for sale. He therefore enlisted the aid of his friends, Yusoff bin Mohamed Zin (PW4), Haji Yaacob (PW5) and one Ustaz Jaffar and one Hussin Naim neither of whom were called as witnesses. Haji Yaacob said that Yusoff had come to him with an option. He altered this document and then proceeded to type the option dated March 22, 1980 (Exhibit P2).

At the time the option was prepared Malik was not in the picture. Malik does not dispute this. He says that no option was shown to him. It is therefore safe to infer that at that point in time he had no vested interest in the matter. Dagang's attitude to it was that the land would only be sold to someone with the necessary capital so that the profit could be shared. Yusoff's evidence is that he was hoping for a 2% commission but that he never received anything at all.

The next stage centres around the Agreement with Asnah dated April 24, 1980 (Exhibit P1). It appears to have come about in this way. Haji Yaacob is the Plaintiff's cousin. He saw the land and estimated its value to be $60,000/– to $70,000/-. He knew that Malik had the money. Since Dagang and Yusoff had asked him to find a financier he broached the matter to Malik. Malik went to the land office, made a search and noted that the registered owners were all deceased. He says that he sent Dagang to Kuala Lumpur with money to find out from Esah's party if they would agree to take out L.A. and was informed that they thought the land had already been sold. Malik then made further investigations from the lawyers concerned in the purported sale and discovered that only earth had been sold from the said land. After the discovery he appears to have decided to proceed.

The first agreement with Asnah was prepared after a discussion between Malik and Dagang. The document is in Malay. It says in so many words that Dagang is a co-purchaser. Haji Yaacob says he prepared this document and meant to refer to the whole of the land. He admits that Dagang insisted that his name be included in this Document as a purchaser.

Now Haji Yaacob also says that he expected 2% commission but he did not discuss the 2% commission with Malik.

He thought that Dagang insisted that his name be put in because Dagang was afraid he might not get the commission expected from Malik. Haji Yaacob specifically says that Dagang told Malik that he expected commission because Dagang was afraid that Malik wanted to swindle him.

But Malik's evidence on the first agreement is that Dagang insisted that his name be put into the agreement because maybe he was afraid Malik would swindle him of his share or of his commission. If his evidence is to be accepted this is pure supposition. Malik categorically states that he did not know how much the commission was, that he

did not discuss any commission with Dagang, and that if there was any commission to be paid maybe it is to be paid to Dagang from the seller's commission.

I was not satisfied with Malik's answers on this point.

Some further observations are pertinent. The option taken on March 22, 1980 was between Asnah and Esah on the one part and Dagang and Yusoff on the other. It assumes that the whole of the said land was Asnah and Esah's to sell. Neither Dagang nor Yusoff were sagacious enough to investigate the legal position.

But Malik was considerably more sophisticated. By April 24, 1980 he had checked the situation. Remembering that it was the same Haji Yaacob who prepared both documents, it is to be noted that the first agreement is now a straight out agreement for sale and not just an option. Furthermore it is between different parties, *i.e.*, Asnah on the one side and Malik and Dagang on the other.

After this, Malik, Dagang, Haji Yaacob and Hussin Naim went to Kuala Lumpur and met Esah, and the first document prepared by the same Haji Yaacob is again signed by both Malik and Dagang as purchasers.

Malik's evidence is that this document was drawn up at the same time as another document described as a sale and purchase agreement. This second document contains the names of Esah and her six other brothers and sisters. In addition it contained Asnah's name as the eighth person listed therein. In it all eight persons purport, for the receipt of the total sum of $10,000/–, to have agreed to sell the said land which is referred to in the agreement as "our land". The balance from the actual price of $40,000/– is to be paid to them after they have received Letters of Administration and agreed to transfer their names as stated in the grant to the name of the buyers and to accept their division in accordance with the Muslim law (Faraid) after getting the legal ruling from the Majlis Ugama Islam.

A *prima facie* reading of the document suggests that it was made and admitted by all the persons whose names and signatures appeared in it, but in fact the evidence is that Esah alone purported to thumbprint the document on behalf of herself and her six other brothers and sisters.

Why two documents were required is not clear. Malik says that the document which does not include Asnah's name was a separate confirmation by way of assurance whereas the other document which lists Esah and her brothers and sisters as purported recipients of $1,000 each was for the money which Dagang and Malik gave Esah.

Malik says that his intention was to inform Esah. in the document that if it was shown that Esah's father had already sold the land to a third party he would forfeit his $7,000. He said,

> "I dare to do this because I had already investigated through the lawyer that only the earth was sold."

In all the four documents dated April 24, 28 and June 9, 1980, Malik and Dagang are referred to as the purchasers.

Thereafter Dagang got Haji Yaacob to prepare an option dated July 13, 1980 in favour of one En. Abu Bakar bin Mohd. Jani to sell the whole of the said land at $2.80 per square foot. Dagang acted in this matter without prior reference to Malik.

The resale letter is addressed to Dagang alone. Dagang gave it to Malik who read it and said he would settle the matter with Ee Yew Lin.

Based upon the evidence given so far, it is my thinking that Dagang was not a mere agent of the plaintiff acting with no hope of any entitlement to anything other than some commission which he hoped to gain from the sellers. If that was really the case it would have been a simple matter to have included in the agreements with Asnah and Esah a statement to the effect that they were to pay him a commission.

I think that the real position was that Dagang was entitled to regard himself as a participant in a joint venture with the plaintiff. The wordings of the Agreement expressly support this. So does his conduct in looking for purchasers at a higher price after the agreements with Asnah and Esah were concluded.

What the precise value of those rights were in early September 1980 may well have been indeterminate. But with a ready offer in excess of $140,000, the difference was over $100,000. Substantial profits were to be made and it must have been thought by Dagang that he was entitled to a substantial share of them.

The next factual issue with which we are concerned is the legal validity of the document dated September 20, 1980 which is described by Malik and his solicitors as an assignment by Dagang of all his rights to Malik.

On the face of it, this document appears to have been made in the usual course of business in a Solicitor's office.

However, it has several unhappy features.

Malik contends that Dagang fully understood the nature and consequences of this document which was repeatedly explained to him in his solicitors' office and that it is a valid assignment.

Dagang, on the other hand, said that the true nature of the document was not explained to him and he executed it thinking that it was only a formal acknowledgement of the loan which he admitted he owed Malik.

Mr. Devadason is related to Malik. He is married to Malik's cousin.

The fact that Dagang must have handed the resale letter (Exhibit D8) to Malik after September 2, 1980 is not one that can be contested simply because on September 17, 1980, Mr. Devadason not only wrote to Dagang but also extended a copy of this letter to Ee Yew Lin and Sons quoting their reference No. 505/80/ETH/ken.

But Malik's responses in this connection were far from satisfactory. When cross-examined on the letter written by Mr. Devadason to Dagang just referred to, Malik admitted that he had instructed Mr. Devadason to write the letter but claimed that he did not know at what price Dagang had offered to sell to Ee Yew Lin's client. Even after the figure was given to him he denied knowledge. This denial was most unconvincing.

In later cross-examination, Malik claimed that he could not remember whether he produced the resale letter to Mr. Devadason or whether he saw the letter in Mr. Devadason's office. He claimed that he could not remember what the letter was about.

After he was shown the letter he said that he had taken the letter to Mr. Devadason and instructed him to write to Ee Yew Lin and to Dagang and that he had explained to Mr. Devadason the whole story and Mr. Devadason wrote the letter dated September 17, 1980. He said he definitely gave Mr. Devadason the agreement of April 24 and 28, 1980, at that time.

Subsequently, in answer to the Court, Malik said that he knew that the property was being offered for $147,050 when Dagang showed him the letter dated September 2, 1980.

Malik said that he then told Dagang that he should not have put up the property for sale and said, "Never mind, I will go and see my lawyer about this."

Malik's mildness here is sadly matched by the vehemence of the language used in Mr. Devadason's letter of September 17, 1980.

It is not disputed that on September 11, 1980 Malik got Dagang to sign a written acknowledgement that Dagang owed him $4,750. Dagang's version of the meeting was that it turned around a discussion of the profits to be made and the manner in which the loan was to be set off. Malik's reference to this meeting was "I can't answer why I did not take on the assignment on September 11, 1980."

We need to remember that on September 13, 1980, Asnah was registered on the title as a one-third owner. It seems reasonable to infer that Esah's registration was also imminent since this took place only ten days later on September 23, 1980.

But one point which should have been apparent to all concerned when Mr. Devadason wrote his letter on September 17, 1980 was that there was a clear conflict of interest between Malik and Dagang.

After this letter was sent, Malik said that he, Haji Yaacob and Yusoff went to Dagang's house and took him to the Klebang Beach to talk it over. After a half-an-hour discussion Dagang agreed to assign his rights. Malik said that it was not that he was getting rid of Dagang but that it was time for Dagang to give him back his rights and Dagang agreed to do so.

Yusoff appears to have dropped out of the picture after the signing of the option agreement on March 22, 1980. He now re-appears and in cross-examination claims that Malik had asked him to go to Dagang's house with Hajj Yaacob and that he did so. He confirmed the discussion at Klebang but

says there was no discussion whatsoever about Ee Yew Lin's letter nor did he know that Dagang already had a buyer. He claimed that Dagang agreed to the assignment provided Malik would not claim the loan and that Haji Yaacob suggested that a letter be made at the lawyer's office. He then said that he was asked to go to Mr. Devadason's office the next day and did so.

But Haji Yaacob's evidence is that Yusoff and one Ustaz Jaafar went to Dagang's house earlier to talk about a loan which he wished to get from Malik, which loan was given. He said that he never went to Dagang's house with Malik and Yusoff and only got to know of Ee Yew Lin's letter subsequently. And Dagang himself whilst confirming the visit to Klebang and the request to go to Devadason's office says that only Malik and Yusoff came to his house. The discussion was about the loan that he had taken and it was on that basis that he went to Mr. Devadason's office.

Having heard this evidence, I consider it highly probable that the prospective profit which Dagang thought he might make was uppermost in his mind when the discussions took place on September 19, 1980 at Dagang's house and at Klebang. The total omission of any mention of Mr. Devadason's letter of September 17, 1980 in these discussions is particularly striking. Had Dagang not yet received it? Did Malik not tell him that it had been sent? Haji Yusoff was the maker of all the contested documents. If he was in fact there would he not have been called to Mr. Devadason's office too?

It is the observation of this Court that there is a marked disparity in the intellectual capacity of the plaintiff and Dagang. Meaning no disrespect to him, Dagang seemed somewhat slow on the uptake.

When the parties appeared before Mr. Devadason on the 20th, Malik was quite clear about his objectives. Yusoff was with him.

Mr. Devadason says that Malik instructed him to draw up the assignment and he dictated the document to his secretary PW3. As it was dictated he explained it to Dagang. The secretary then typed a draft which was explained to Dagang. The two agreements referred to in the draft assignment was shown to him and Dagang produced his identity card which was entered into the draft. The secretary then typed out a final copy which she explained sentence by sentence to Dagang. After this Mr. Devadason again explained it to him and Dagang then signed the document.

In cross-examination Mr. Devadason said that he did not think that the plaintiff and Haji Yaacob had come to see him earlier nor does he recollect their having come to see him before September 20, 1980. He agreed that the resale letter from Ee Yew Lin dated September 2, 1980 (D8) was handed to him by Malik but Mr. Devadason says Malik did not hand him any other documents at that time.

Mr. Devadason says that there was no discussion on September 20, 1980 about Ee Yew Lin's letter. He thinks that the plaintiff must have had the two previous agreements dated 24 and 28, 1980 with him on September 20, 1980 and that the dates pertaining from the agreement had been inserted into the assignment.

Most importantly, Mr. Thara Singh, after stating to the Court that he had been verbally instructed by Dagang to do so, put to Mr. Devadason that all that he explained to Dagang was that Dagang was signing an acknowledgement for a loan of $4,750.

This was emphatically denied.

Mr. Devadason's secretary Ms Yeoh Kwee Peng (PW3) also gave evidence for the plaintiff. She said however that after she took down what was dictated to her by Mr. Devadason she explained the matter to the parties. She then typed out a draft and explained this to the parties. They agreed to this and she made a fair copy of the draft. She explained this to the parties and they signed it. In cross-examination she says that nobody else explained the document. As for the dates of the two previous agreements on April 24 and 28, 1980 which were left blank in the fair copy of the assignment and subsequently written in she says that she got these dates from the agreements which were in the office file. It was also put to her that the assignment was not explained to Dagang but she insisted that she had done so.

What is to be made of all these? Dagang gave evidence on oath that when he signed the assignment nobody had explained it to him. Nor Mr. Devadason nor his clerk. He thought that the assignment which he was signing was a document regarding a loan.

These are very serious allegations to make

against a solicitor because they imply that he was party to a fraud.

Taking all the circumstances into account, it seems to me that Mr. Devadason's memory was obviously in error when he said that he thought that when Ee Yew Lin's letter was handed to him he had not been given any other documents at that time. In the normal course of business a file would have been opened when a letter was sent out, and the plaintiff's evidence is that he handed in the agreements together with Ee Yew Lin's letter.

But the problem is, as Devadason himself acknowledges, that his Malay is very rudimentary. He therefore had to rely on the plaintiff to supply the technical words in Malay to explain what the document was all about to Dagang.

Having seen and heard him I am satisfied that Mr. Devadason genuinely believed that he had satisfactorily discharged his duty in getting across the contents of the document to Dagang before Dagang signed the assignment.

On the face of it he may well have been justified in concluding that the document had satisfactorily been explained particularly as his secretary had also explained the document.

But what is not disputed is that Ee Yew Lin's letter was not discussed at all. The problem here is that if all the documents were on the file by September 17, 1980 when the notice was sent to Dagang by Mr. Devadason, then two factors should have been apparent. One is that in exchange for $4,750 Dagang was purportedly revoking his rights to participate in a sale where the profits to be made was over $100,000/–. The other was that having given notice to Dagang that he had instructions to sue him for breach of contract, the conflict of interest was plainly established. Furthermore the letter of September 17 says that $4,750/– had already been paid sometime before the letter written whereas the assignment on September 20, 1980 suggests that Malik was giving him $4,750/– as consideration for the revocation. The assignment is not a precise document.

In these circumstances, would it not have been prudent for Mr. Devadason to require that Dagang be independently advised?

Another disturbing feature about this exercise is that at the same time that the assignment was prepared and executed, another document was typed in Mr. Devadason's office. This document read:–

> "I acknowledge a receipt the sum of $4,750/– only (Dollars Four Thousand Seven Hundred and Fifty only) from Abd. Malik bin Abd. Majid dated September 20, 1980."

This document is signed by Dagang but it is not witnessed by Mr. Devadason but by Yusoff. However, the date has been written in black ink and on the ten-cent stamp which was cancelled and the writing bears a marked similarity to the date written into the assignment. In cross-examination Mr. Devadason admitted that the writing looked like his writing but could not say for certain if this acknowledgement had been prepared by him. Ms Yeoh Kwee Peng admitted that this document was also prepared by her but neither Mr. Devadason nor Ms Yeoh said anything about having explained this document to Dagang. Nor were they asked. Dagang's own evidence on the point is that the only explanation he received was from Yusoff to the effect that the documents he signed were an acknowledgement for a loan.

One last disturbing feature is the omission to give Dagang a copy of the assignment to take with him. The original was stamped by Mr. Devadason's office and appears to have been retained by him.

The legal aspects of the validity of this assignment and the omission to ensure that Dagang was independently advised will be dealt with later. The next issue with which I must deal is whether Asnah and Esah had in fact contracted to sell the whole of the said land or whether they had only contracted to sell such shares of the said land as they may eventually become registered *proprietors in their own right.*

Before answering this question it would be useful to run through the remaining history of the events which led to the institution of these proceedings.

Although it was obviously apparent to all concerned when the agreements were signed on April 24 and 28, 1980 that Asnah and Esah would only be entitled to such fractional shares of the said land as they would be decreed to be entitled under Islamic law, they were registered on September 13 and 23, 1980 as co-owners of the entire third shares which stood in the names of their respective predecessors in title.

How this was achieved was not in evidence before the Court. The plaintiff who had the responsibility of assisting in the extracting of the Letters of Administration did not clarify the matter nor was he asked.

The plaintiff claims that he went to Mecca after the assignment and when he returned, Mr. Devadason told him that he caveated the land. It was done on October 8, 1980 and the reason why it was required is not clear. After all, from Malik's point of view Dagang had relinquished his rights. And there is nothing to suggest that Malik then attempted to get Asnah and Esah to execute a conveyance.

The resurgence of the correspondence between the combatants from July 1981 onwards which led to the filing of Malik's action in August 1981 has already been referred to earlier. This correspondence has an interesting angle to it which emerged during the cross-examination of Dagang.

Then it came to be known that he is also illiterate. But by July 1981 it would appear that Mr. Thara Singh's office had got fully embroiled in this matter. Dagang says that the letters to Asnah and Esah of July 3, 1981 from him to these two ladies were prepared there. He says they were prepared at the request of Asnah and Esah. Dagang says he had gone to Mr. Thara Singh's office at Asnah's request. On July 7, 1981 Mr. Devadason had written to Dagang to say that he had no rights in the matter and Dagang says that the first time he went to Mr. Thara Singh's office was when he got this notice. I am unable to accept this evidence. Copies of Dagang's letter to Asnah and Esah were extended to Malek and it follows that he was in touch with these ladies when the letters were prepared.

The problem with Dagang is that he does not deny that he received the letter dated September 17, 1980 sent to him by Mr. Devadason in which notice was given to him not that he had no rights but that the contract for the sale of the land by the ladies should be respected. He did go to Mr. Thara Singh about this letter but the evidence does not show when he did so. In any event no reply was given to the letter of September 17, 1980. But a very strong reply was given by Dagang to Mr. Devadason's letter of July 7, 1981. Curiously, although it was in evidence that this reply from Dagang to Devadason and Malik was also prepared in Mr. Thara Singh's office, it was typed on plain paper and not on the Solicitor's letterhead.

The reason for this camouflage has not been explained in Court but one of the possibilities in this case is that Asnah and Esah were inspired to claim $40,000/- and $70,000/- for their respective shares only after they had obtained legal advice from somebody. The first time in the history of this matter when Dagang comes out with a statement in writing that they are entitled to make such claims is coincidentally made at the same time.

So far as the alleged assignment is concerned, Dagang's stand at the time was the total denial of the existence of any such document and the fact that he had signed it.

Asnah gave evidence and was cross-examined. She insisted that from the very beginning she was of the view that she was only selling her share for $40,000/-. Esah did not give evidence.

Malik has had the advantage of the able assistance of Mr. Humfrey Ball in this case. Whilst I am indebted to him for the assistance he has given this Court in its deliberations I am unable to agree that this Court should be influenced by what is stated in the option agreement of March 22, 1980 in determining the true meaning to be given to the agreements between the purchasers and Asnah and Esah. The Option Agreement is between different parties and it preceded the first agreement more than a month. The document is in very general terms. Neither of the ladies had any clear idea of the ownership of the land and it seems even possible that they thought that it might already be sold. There is no indication that at the time Esah had any authority to commit her brothers and sisters to the transaction. In all the circumstances, equitable considerations would justify the Court in regarding that option as no more than an invitation to treat.

When coming to the first agreement between Malik and Dagang on the one part and Asnah on the other, there is no indication whatsoever that this agreement was executed in the exercise of the option aforesaid. It was in fact a totally new and independent document. What was the subject matter of the sale? Since Malik knew that the land was in the names of three deceased persons he could not possibly have thought Asnah alone had authority to sell the entire land. Between him and his cousin, Haji Yaacob, if it was their intention that the document should be in interpreted to mean only that the subject matter of the sale should be, not such fractional share as Asnah might be beneficially entitled to under Muslim

Law, but such share of which she might eventually find herself the registered owner, and that for such share she should be paid an equivalent proportion that the same bore to the sum of $40,000/–, then they could easily have made their meaning clear because they were in full control as to the terms the document should take.

Instead, what we have here is a document which is open to the construction which Asnah had put upon it, namely that she was being offered $40,000/– for her share alone as she would be beneficially entitled to under Muslim Law. On the balance of probabilities I am unable to hold that she was not entitled to take such a view and did take such a view on April 24, 1980. The agreement with Esah and her brothers and sisters on April 29, 1980 is bedevilled with the same complications. Whilst the demand for $70,000 for this share is admittedly absurd, the ambiguity is there as to whether they too did not think that they were selling their shares for $40,000.

Precisely what their shares were under Islamic Law is not known to me because no Fatwa or Faraid has been produced. These matters are relevant not to satisfy a mere morbid curiosity on the part of the Court. It is the normal practice on an intestacy for Administrators to apply for leave before land belonging to the Estate can be sold. Trustees have a duty to obtain the best price possible. Even where morally bound to conclude a previous sale they have a fiduciary duty to "gazump" if a better offer appears: see *Buttle* v. *Saunders*[1] and *Snell's* Principles of Equity 27th Edition page 252. There is no evidence of any Court approval applied for or obtained after these agreements. The Court must ensure that the prescribed legal procedures are not being short-circuited.

Malik's case at the outset was that he had bought the entire land for $40,000. The uncertainties which the evidence has generated has led him to a situation where he now wants the Court to decree specific performance of a notional contract by each of these ladies to transfer the 1/3 share, of which each is registered, to him for the reduced consideration of $13,333.33. He says that he is prepared to leave the last third share in the hands of Mohamed bin Mahmud in whose name it is registered.

This application I refuse. No such contract was over made between the parties and this Court cannot now make one up for Malik. The evidence shows both parties were under a misapprehension as to what precisely they were selling and for what price. The terms of the original contract are clearly too uncertain to be enforced.

Malik's second prayer is that he has a lien to the land arising out of his claim for specific performance. Pursuant to this a caveat was filed, not against the 1/3 share held by each of the two ladies but against the whole of the land which Malik claimed to have bought. In the light of my judgment this caveat is untenable and I order it to be removed. From any point of view the third registered shareholder is not shown to have had any dealings whatsoever with Malik and there was no reason why he should ever have been encumbered with the caveat.

The next issue is whether any damages should be awarded. But on the facts before me I am unable to hold that there was any breach of contract on the part of these two ladies. Consequently the claim for damages also fails. In any case there is not a shred of evidence before me of any damages which Malik has sustained.

Such evidence as there is to the effect that Malik paid these ladies by way of advances the sum of $4,000 to Asnah and $7,000 to Esah for a consideration which has wholly failed. In equity it is only right that they should refund this money to him and I therefore adjudge and decree that they so do together with interest at the rate of 8% per annum from the date on which such monies were paid.

In the exercise of my discretion I make no order for costs in Civil Suit 86 of 1981.

In the light of my previous findings, it may well be that the orders in this application are going to be largely of academic interest only.

Nevertheless the rule is that parties are bound by their pleadings. Dagang's claim does not say that the assignment of September 20, 1980 was unconscionable or should be set aside on the ground that he had not been independently advised. He advanced a claim of fraud and the onus upon the plaintiff who makes such charges is a very high one. See *Davy* v. *Garrett*[2] at page 489.

As he has not discharged that onus, this claim must fail. It seems to me appropriate here to say that solicitors and counsel who make such charges in their pleadings and in Open Court do so at their

peril. Their duty as officers of the Court, and to all concerned, is not discharged merely by saying that they were instructed to do so. *Odger's* on Pleadings and Practice is perhaps the most elementary book on the subject. In the 20th Edition at page 206, he spells out Counsel's duty as follows:–

"Counsel must insist on being fully instructed before placing a plea of fraud on the record. Such a plea should never be provided on insufficient material, nor without warning to the client, if appropriate, that by adopting such an aggressive line of defence he may double or treble the amount of damages which he may ultimately have to pay."

Reference may also be made to Lord Denning's pronouncements in *Associated Leisure Limited* v. *Associated Newspapers Limited*[3] at page 456.

It is the view of this Court that it should be a salutory practice in Malaysia if hereafter solicitors who are instructed to make such charges first obtain a proof of their client's instructions in writing and get the same verified in the form of a Statutory Declaration so that they are not left high and dry when the time comes to justify their conduct in Court. In the present case no evidence whatsoever was led in support of numerous allegations contained in Dagang's Statement of Claim. But on the other side of the line Malik has not got off unscathed. His total lack of candour on the true role of Dagang in this matter and his attempts to relegate him to the status of a mendicant, has not earned Malik the approbation of this Court. He who comes to do equity, must come with clean hands.

A person who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story: see *Sarkar* on Evidence 11th Edition page 893 and the authorities there cited. Dagang has not discharged the onus upon him to show fraud and consequently his claim for damages must be dismissed. The declaration that he seeks cannot in the circumstances be made either since I have held that there are no contracts which can be enforced against Asnah and Esah. Malik's conduct however, is a material factor on the issue of costs as to which my finding is that each party should bear its own costs. Civil Suit No. 121 of 1982 is dismissed.

Order accordingly.

Solicitors: *Humfrey Ball & Co.; Tara Singh & Co.*

GREAT ONE COCONUT PRODUCTS INDUSTRIES (M) SDN. BHD. v. MALAYAN BANKING BHD.

[O.C.J. (Zakaria Yatim J.) May 10, 1985]

[Kuala Lumpur – Suit No. C 557 of 1982]

Banking – Dishonour of bank drafts – Breach of contract – Libel – Damages – Substantial damages if the plaintiff is a trader.

Defamation – Libel – Dishonour of bank draft – Damages.

In this case the plaintiff had bought five bank drafts from a branch of the defendant bank. The plaintiff gave the bank draft to its clients as payment for the supply of coconuts. The bank drafts were dishonoured when presented on May 2 and 4, 1981 but were cleared on May 6, 1981. As a result the plaintiff lost its reputation and coconut suppliers wanted payment in cash in subsequent dealings. The plaintiff brought an action against the defendant for damages. Judgment was given for the plaintiff and it was ordered that damages be fixed at a subsequent hearing.

Held: (1) where the plaintiff is a trader he is entitled to recover substantial damages for the wrongful dishonour of his bank drafts. He need not even plead or prove actual damage;

(2) the plaintiff as a trader in this case was entitled to substantial damages for breach of contract and libel, but the damages must be reasonable;

(3) the factors to be taken into consideration are firstly the position and standing of the plaintiff as a trader; secondly the nature of the trade of the plaintiff; thirdly the conduct of the Bank in dishonouring the drafts and fourthly whether there was injury to the credit of the plaintiff as a trader;

(4) in the circumstances substantial damages in the sum of $15,000 was awarded for the wrongful dishonour of the cheques.

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854) 23 L.J. Ex. 179; 9 Ex. 341; 156 E.R. 145.
(2) *Ng Cheng Kiat* v. *Overseas Union Bank* [1984] 2 M.L.J. 140.
(3) *Gibbons* v. *Westminster Bank Ltd.* [1939] 2 K.B. 882, 888.
(4) *Bank of New South Wales* v. *Milvain* (1884) 10 Vict L.R 3, 5.
(5) *Patrick Kinlan* v. *Ulster Bank Ltd.* [1928] I.R 171, 188.
(6) *Baker* v. *Australia and New Zealand Bank* [1958] N.Z.L.R. 907.

CIVIL SUIT.

David Alfred for the plaintiffs.

M. Nagarajah for the defendant.

Cur. Adv. Vult.